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Before the  
Federal Communications Commission  
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 98-141

In the Matter of )  
 )  
Conditions Proposed By )  
SBC Communications Inc. and )  
Ameritech Corporation for their )  
Pending Application to Transfer Control )

## COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits these comments on the proposed merger conditions (the "Proposed Conditions") offered by SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech").

OpTel urges the Commission to reject SBC and Ameritech's Proposed Condition XVIII, "Access to Cabling in Multi-Dwelling Unit Premises ("MDUs"), and Multi-tenant Business Premises," as drafted and rather, require: 1) SBC and Ameritech to provide competitive local exchange carriers ("CLECs") immediate access to the on-property wiring that they own and control at residential multiple dwelling unit and commercial multi-tenant properties (collectively, "MDU's") and 2) SBC and Ameritech to configure all new MDU networks to a single point of interconnection ("SPOI").

In general, OpTel is encouraged by the breadth of the Proposed Conditions. They are, in fact, "wide-ranging ... and unprecedented in their scope."<sup>1</sup> Among other things, OpTel agrees that the Proposed Conditions regarding CLEC collocation rights and network unbundling/UNE pricing are positive steps forward in the effort to open the local telephone monopolies to competition. Although OpTel has some concerns regarding the details of those Proposed Conditions, it is confident that other parties will comment on the specifics of those proposals and that the final conditions adopted and agreed to by SBC and Ameritech will reflect those comments.

Proposed Condition XVIII, however, provides little more than window dressing to deal with one of the most significant problems facing CLECs today —

<sup>1</sup> Ex Parte Letter from Richard Hetke, Ameritech, and Paul K. Mancini, SBC, to Magalie R. Salas, FCC (July 1, 1999) ("Ex Parte") at 2.

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lack of access to MDUs. Although the inclusion in the Proposed Condition XVIII, which targets the MDU access issue, at least evidences an awareness by SBC and Ameritech of the problem, the remedial steps proposed are entirely inadequate. Indeed, SBC and Ameritech's offer to conduct an abbreviated "trial" to identify procedures and costs associated with providing CLECs with access to cabling within MDUs is a disingenuous ploy to further delay the competition mandated by the 1996 Telecommunications Act. OpTel therefore opposes Proposed Condition XVIII in its current form.

## DISCUSSION

Today, the lack of access by CLECs to MDU on-property wiring is perhaps the single largest impediment to residential and small-business telephone competition.<sup>2</sup> To address this competitive barrier, however, SBC and Ameritech propose merely to conduct a very limited trial, over as much as a two-year period, of providing "one or more interested CLECs" with access to MDU cabling in five unspecified cities.

In addition, although there is no reason that all new MDU networks cannot easily be terminated to an SPOI — thereby making competitive access to new and remodeled MDUs a reality — SBC and Ameritech propose merely to configure "single-building" MDU properties to an SPOI. Neither of these steps will have any significant pro-competitive impact on the local telephone markets in the SBC/Ameritech regions.

### **I. SBC And Ameritech Should Commit To Providing CLECs With Access To MDU On-Property Wiring Without Further Delay.**

Currently most MDUs — including campus and high-rise residential and commercial complexes — feature multiple points of interconnection that are inaccessible to new providers seeking to serve customers. As a result, a CLEC seeking to compete on an MDU property must either build redundant facilities from the property line to each customer or lease entire loops from the ILEC in order to reach individual subscribers in the MDU. The costs and delays associated with either of these approaches are prohibitive.

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<sup>2</sup> See generally Promotion of Competitive Networks in Local Telecommunications Markets, NPRM, WT Docket No. 99-217 (rel. July 7, 1999).

The MDU access problem is prevalent in the SBC and Ameritech regions. For example, in Texas, OpTel has encountered a number of MDU properties where the on-property network was configured by SBC to terminate to multiple demarcation points. Following a series of discussions, SBC has agreed to reconfigure certain properties to an SPOI and to allow OpTel to cross-connect at the SPOI. At these select properties, where OpTel is now providing a competitive telephone service, there have been no significant technical or network reliability issues. Nonetheless, SBC continues to resist reconfiguration on a broader scale throughout its region.

Similarly, the California Public Utilities Commission ("PUC") has ordered SBC-affiliated Pacific Bell to reconfigure its MDU distribution networks so as to make the on-property wiring available to competing providers.<sup>3</sup> Notwithstanding that order, and as set forth in the attached complaint of OpTel before the California PUC, Pacific Bell has refused to reconfigure wiring on properties at which OpTel is seeking to provide service and thereby "effectively prevented ... OpTel from establishing service to numerous MDU properties" in California.<sup>4</sup>

SBC and Ameritech resist providing access to MDU on-property wiring for only one reason: they know it will lead to competition. Now, in the context of seeking FCC consent to a transfer of control, SBC and Ameritech propose, in essence, to study the problem of CLEC access to MDU on-property wiring. Proposed Condition XVIII would require the companies to conduct a "trial" that will last for the better part of two years to "identify the procedures and associated costs required to provide CLECs with access to cabling within MDUs."<sup>5</sup> This commitment is, in fact, little more than window dressing and, because it likely will occasion further delay by SBC and Ameritech in dealing with the substance of the MDU access problem, actually may be counter-productive.

**A. The Trial Itself Will Have No Impact On The Development Of Competition.**

To begin with, the Commission should discount any notion that the "trial," in and of itself, will have any significant pro-competitive effect. In plain terms, the number of units involved and the structure of the trial virtually guarantee that the

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<sup>3</sup> See Irvine Apartment Communities v. Pacific Bell, Case No. 98-02-020 (Cal. PUC, Dec. 3, 1998).

<sup>4</sup> TVMAX Telecommunications, Inc. d/b/a/ OpTel, v Pacific Bell, Complaint (filed Apr. 29, 1999) (attached).

<sup>5</sup> Ex Parte at 29.

competitive impact of the trial itself will be inconsequential. As proposed, the trial will take place in five (unspecified) cities and will involve as few as a thousand residential units in each city. To help put that number in context, single MDU properties sometimes have more than a thousand units, and frequently they have several hundred. Thus, the trial will likely involve only one, or a very few, properties in each of the trial markets.

Second, the Proposed Condition provides that the trial may involve only a single campus-style MDU. As SBC and Ameritech surely know, however, it is precisely the campus-style MDUs that present the most intractable access problems for new entrants. Although rewiring a high-rise MDU may be expensive, rewiring a campus-style MDU may be completely impractical given the distances involved, the existence of mature landscaping, and other amenities (*e.g.*, swimming pools, tennis courts) on the property. Thus, although the access problem is greatest in campus-style MDUs, SBC and Ameritech have proposed a merger condition that would allow them to all but ignore that aspect of the problem for the next two years.

Finally, the pricing mechanism proposed appears to lay the entire burden for any network reconfiguration on the first CLEC seeking access. It is hard to think of a more direct disincentive for CLECs to participate in the trial — at least on any large scale basis. Although the new entrant seeking access should bear a fair share of the reconfiguration expense, it should not be made to carry the entire burden. The ILEC that originally configured the network to make it inaccessible to others, and CLECs that subsequently request access to the MDU, also should bear some portion of the costs involved in the reconfiguration. The intent — following reconfiguration — will be to have a network that can be shared by any provider that has a customer on the property. The costs of that network also should be shared.

For all of these reasons, the Commission can expect that the proposed “trial” will be of limited utility to CLECs seeking to compete for customers on MDU properties.

**B. The Proposed Trial Will Be An Occasion For Further Delay And Foot-Dragging By SBC And Ameritech.**

Not only will the proposed trial be of little value on its own terms, but it will provide SBC and Ameritech with an excuse for further unnecessary delays in resolving access problems for CLECs at MDUs.

As proposed, SBC and Ameritech may conduct the “trial” over a two-year period. The Proposed Condition provides that the trial may not even begin until six months after the closing date of the merger, and not be “fully deployed” for up to one year. The “trial” may then continue for another full year. In the meantime, CLECs seeking to compete generally will face the same MDU access problems in the SBC/Ameritech regions that they do today.

Indeed, rather than facilitate access on a large scale, the trial will provide SBC and Ameritech with an excuse for further delay. Rather than respond on the merits to future requests for access to MDU wiring, SBC and Ameritech may try to defer action on the requests while they “study” MDU access during their FCC-sanctioned trial. Proposed Condition XVIII, in short, is pregnant with potential for abuse.

Proposed Condition XVIII is all the more troubling because, in fact, there is no need for a “trial” regarding CLEC access to MDU wiring; and certainly not one that will require up two years to complete. ILECs, including SBC, already are making MDU on-property wiring available in a few areas, in some cases pursuant to orders of state regulatory authorities. The process of reconfiguring MDU wiring to allow competitive access not only is feasible, but well known to SBC and Ameritech, which have had ample opportunity to study the “procedures and associated costs.” Their commitment now to further study the issue has a “don’t-throw-me-in-the-briar-patch” quality to it that should not be lost on the Commission.

**C. Proposed Condition XVIII Should Be Amended To Require SBC And Ameritech To Begin Making MDU Wiring Accessible Without Further Delay.**

Rather than provide SBC and Ameritech with an affirmative reason to continue stalling requests for access to MDU wiring, Proposed Condition XVIII should be amended to require the companies to make access available throughout the SBC/Ameritech regions without further delay.

Specifically, there should be no “trial” period or, if there is to be a “trial” period, it should be significantly abbreviated. Most importantly, SBC and Ameritech should commit to immediately begin negotiating in good faith with CLECs to develop tariffs and interconnection agreements and/or amendments to interconnection agreements that will facilitate the establishment of SPOIs at MDU

properties, and provide access to such SPOIs on a going-forward basis.<sup>6</sup> The costs of any reconfiguration required to facilitate competitive access to MDUs should be borne by all carriers concerned, including LECs seeking access to the property after the reconfiguration is complete.

The time has long-passed for studying the MDU access problem. The next century is dawning and ILECs such as SBC and Ameritech continue to construct obstacles to widespread facilities-based local telephone competition. The trial process described in Proposed Condition XVIII has the appearance of being pro-competitive while, in fact, it simply provides SBC and Ameritech with another means of delaying competition. OpTel therefore opposes that Proposed Condition as drafted.

**II. SBC And Ameritech Should Commit To Configuring On-Property Networks In All Newly Constructed Or Retrofitted MDUs To Permit Competitive Access At An SPOI.**

Paragraph 58 of Proposed Condition XVIII provides that “[f]or 3 years after the Merger Closing Date, where SBC/Ameritech owns or controls the cables, SBC/Ameritech shall install and provide new cables in a newly constructed or retrofitted single-building MDU or newly constructed or retrofitted multi-tenant business premises in a manner that will permit CLECs a single point of interface.”<sup>7</sup>

There is no apparent reason for the “single-building” limitation in the Proposed Condition on the type of new and retrofitted MDU premises that will be configured to an SPOI. When new or retrofitted construction is involved, it is just as reasonable and feasible for SBC and Ameritech to configure multi-building MDUs for competitive access as it is for the companies to configure single-building MDUs for competitive access. Indeed, when OpTel installs wiring on a new property, regardless of the number of buildings involved, it designs the network to be accessible by all of its competitors, including the ILECs, at an SPOI.<sup>8</sup> SBC and Ameritech surely can do so as well.

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<sup>6</sup> Subparagraph g in Proposed Condition XVIII refers only SBC. Whatever other changes are or are not made to the Proposed Condition, subparagraph g should apply to both SBC and Ameritech.

<sup>7</sup> Ex Parte at 30.

<sup>8</sup> See Letter from Louis Brunel, OpTel, the Chairman Kennard (Aug. 11, 1998) (“[W]hen OpTel configures or reconfigures an MDU network, it often is required by state law to bring all inside wiring on the premises to a single demarcation point so that others (including the ILEC) can have non-discriminatory access to the MDU. Indeed, even in states in which OpTel is not required to do so, it uses a single demarcation point configuration.”).


Further, not only is there no pro-competitive justification for the "single-building" limitation, the restriction undermines the essence of the commitment. As noted above, the problem of CLEC access to MDUs is most acute in the context of multi-building, "campus-style" properties. If Proposed Condition XVIII is going to have the competitive impact intended by the Commission staff, it must be broadened to include multi-building MDUs.

#### CONCLUSION

The Proposed Conditions outline many important first steps that SBC and Ameritech can take to promote local telephone competition. First steps no longer are enough, however. With regard to the issue of CLEC access to MDU wiring, Proposed Condition XVIII simply is inadequate. For that reason, OpTel urges the Commission to reject the Proposed Conditions in their present form and to deny the transfer of control.

Respectfully submitted,

OPTEL, INC.

  
\_\_\_\_\_  
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Washington, DC 20036  
(202) 429-4900

Its Attorneys

July 19, 1999

**Attachment 1**

**(TVMAX Telecommunications, Inc. v. Pacific Bell)**

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

TVMAX Telecommunications, Inc. d/b/a OpTel, )  
OpTel (California) Telecom, Inc. (U-5797-C), )  
Satellite Management Co., William G. )  
Sommerville, and Clarence Conzelman, )

Complainants, )

v. )

Case No. \_\_\_\_\_

Pacific Bell (U-1001-C) and GTE California, Inc. )  
(U-1002-C), )

Defendants. )

**COMPLAINT**

**GOODIN, MACBRIDE, SQUERI,  
RITCHIE & DAY, LLP**  
John L. Clark  
505 Sansome Street, Suite 900  
San Francisco, California 94111  
Telephone: (415) 765-8443  
Facsimile: (415) 398-4321

**Date: April 29, 1999**

**Attorneys for Complainants**

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

TVMAX Telecommunications, Inc. d/b/a OpTel, )  
OpTel (California) Telecom, Inc. (U-5797-C), )  
Satellite Management Co., William G. )  
Sommerville, and Clarence Conzelman, )

Complainants, )

v. )

Case No. \_\_\_\_\_

Pacific Bell (U-1001-C) and GTE California )  
Incorporated (U-1002-C), )

Defendants. )

**COMPLAINT**

Pursuant to California Public Utilities Code § 1702, TVMAX

Telecommunications, Inc. d/b/a OpTel ("TVMAX"), OpTel (California) Telecom, Inc. ("OpTel"), Satellite Management Co. ("SMC"), William G. Sommerville ("Sommerville"), and Clarence Conzelman ("Conzelman"), collectively referred to herein as "complainants," respectfully make the following complaint against Pacific Bell ("Pacific") and GTE California Incorporated ("GTEC"), collectively referred to herein as "defendants":

**I. INTRODUCTION.**

This complaint seeks an injunction requiring the defendants to reconfigure the facilities that they currently use to serve certain multiple dwelling unit ("MDU") properties in

California in order to allow other carriers the opportunity to compete with them in the provision of telecommunications services to residents of those properties on a reasonable and nondiscriminatory basis that is free of dependence on, and potential manipulation by, the defendants.

TVMAX, through its affiliate, OpTel, specializes exclusively in the provision of high-quality, state-of-the-art telecommunications and enhanced services to MDU residents. TVMAX and OpTel share a common interest with MDU property owners in bringing true choices in facilities-based telecommunications services to MDU residents -- choices that are competitively distinguishable from the offerings of the ILECs. In furtherance of this joint purpose, TVMAX has entered into agreements with a number of MDU property owners in California for the installation, operation, and maintenance of the telecommunications facilities that are necessary to enable OpTel, and other competitive carriers to provide their services to MDU residents. Sommerville and Conzelman are two such property owners. SMC represents their interests and those of a number of other property owners, both as an agent and a property manager.

The MDU properties owned by Sommerville, Conzelman, and other property owners are of various configurations, ranging from single high rise buildings to multiple buildings on campus-style settings located on acres of land. In order to serve these properties, OpTel brings its microwave or other distribution facilities to a suitable demarcation point at or near the property line. From that point, OpTel's services are delivered to residents over inter- or intra-building cable and other inside wiring.

However, OpTel has found that in numerous instances, the existing cable and wiring at MDU complexes does not all terminate at a single demarcation point, but, instead,

terminates at multiple, disparate demarcation points established by the incumbent local exchange carrier ("ILEC") currently serving the property. Due to the existence of mature landscaping and other improvements such as swimming pools, parking lots, patios, and other structures, along with other factors, it usually is not feasible for OpTel or TVMAX to overbuild the facilities that the ILECs use to serve these properties through multiple demarcation points. Nor, for the same reasons, would it typically be feasible for other rational facility-based competitors to do so, either. As a consequence, it is critical in such cases for OpTel or TVMAX to be able to reconfigure the existing wiring at the properties to terminate at a single demarcation point.

Reconfiguring property wiring to establish a single demarcation point requires the cooperation of the ILEC. Not only must the ILEC's entrance facilities be rearranged to terminate at the new demarcation point, but there usually is a need for the ILEC to transfer to the property owner a portion of the inter- or intra-building cable previously used to serve the multiple demarcation points so that the cable can be used on a nondiscriminatory basis by any carrier desiring to serve property residents.

TVMAX has obtained written authorizations from Sommerville, Conzelman, and other property owners to seek demarcation point reconfigurations and stands ready to advance the reasonable costs thereof or to perform all necessary work itself, if doing so would be more time-and cost-effective. However, TVMAX has been completely unsuccessful in procuring the cooperation of the defendants with respect to the reconfiguration of demarcation points at any MDU properties in California. As a result, OpTel has been and continues to be denied the ability to offer its services to a large portion of its target market in California. What is more, the defendants' refusals to comply with their obligations have placed Sommerville, Conzelman, and other property owners at competitive disadvantage by depriving them of the opportunity to

offer residents and potential residents of their properties true alternatives for facilities-based telecommunications and related services. In addition, because TVMAX, on several occasions, had been led by both Pacific and GTEC to believe either that it would be unnecessary to submit requests to establish new demarcation points or that they would comply with such requests on a timely basis, TVMAX has missed commitments that it has made to property owners and is in danger of missing others. This has caused both OpTel and TVMAX to suffer damage to their reputations and good will as the result of their inability to deliver promised services. Moreover, as a result of these delays, in some cases TVMAX is liable for liquidated damages and in other cases is threatened with the expiration of its rights under its agreements.

The defendants have no reason for refusing to honor the complainants' requests other than to impede competition. The defendants' conduct is anti-competitive, discriminatory, violates their tariffs, and is specifically proscribed by existing Commission policy. By this complaint, the complainants are seeking injunctive relief compelling Pacific and GTEC to respond on a timely basis to requests for reconfiguration of demarcation points at MDU complexes either by performing the necessary work as requested or authorizing TVMAX and OpTel to do so. In addition, complainants are requesting that the Commission provide for appropriate penalties to be imposed on the defendants for each day of any unreasonable delay in meeting requests for wiring reconfigurations. Finally, the complainants seek an order requiring the defendants to pay reparations to complainants and other affected property owners for the defendants' respective failures to timely complete demarcation point changes, in the form of refunds of, or credits against, any charges for completing such changes in amounts equal to the full amounts of such charges.

## **II. COMMUNICATIONS**

1. All pleadings, correspondence, and other communications concerning this complaint should be directed to complainants' attorneys as follows:

John L. Clark  
GOODIN, MACBRIDE, SQUERI, RITCHIE & DAY, LLP  
505 Sansome Street, Suite 900  
San Francisco, California 94111  
Telephone: (415) 765-8443  
Facsimile: (415) 398-4321

## **III. JURISDICTION OF THE COMMISSION**

2. The Commission is vested with broad authority under sections 701, 1702, and 1707 of the Public Utilities Code to redress any violation of Commission decisions or applicable provisions of state law. Under sections 1702 and 1707, the Commission has jurisdiction over complaints by individuals and public utilities that set forth "any act or thing done or omitted to be done by any public utility in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission." Cal. Pub. Util. Code § 1702.

## **IV. THE PARTIES**

3. Complainant TVMAX Telecommunications, Inc. d/b/a OpTel is a Delaware corporation and is authorized to conduct business within the State of California. Its address and telephone number are as follows:

TVMAX Telecommunications, Inc.  
c/o OpTel, Inc.  
Attn: Michael Katzenstein  
1111 W. Mockingbird Lane, 10th Floor  
Dallas, TX 75247  
Tel: (214) 634-3824

4. Complainant OpTel (California) Telecom, Inc. is a Delaware corporation and is authorized by the Commission to provide local, intraLATA, and interLATA telecommunications services within California, specifically including the service territories of Pacific and GTEC. Its address and telephone number are as follows:

OpTel (California) Telecom, Inc.  
Attn: Michael Katzenstein  
1111 West Mockingbird Lane  
Dallas, Texas 75247  
Tel: 214-634-3824

5. TVMAX and OpTel are under common ownership.

6. Complainant Satellite Management Co. is a California corporation. Its address and telephone number are as follows:

Satellite Management Co.  
1010 East Chestnut  
Santa Ana, CA 92701  
Tel: (714) 558-2411

7. Complainants Sommerville and Conzelman are both individuals. Their addresses and telephone numbers are as follows:

William G. Sommerville  
c/o Satellite Management Co.  
1010 East Chestnut  
Santa Ana, CA 92701  
Tel: (714) 558-2411

Clarence L. Conzelman  
c/o Satellite Management Co.  
1010 East Chestnut  
Santa Ana, CA 92701  
Tel: (714) 558-2411

8. Defendant Pacific is an incumbent local exchange carrier that provides service to customers in exchanges located throughout the state. Pacific's address and telephone number are as follows:

Pacific Bell  
140 New Montgomery Street, Ste. 1819  
San Francisco, California 94105  
Tel: (415)-542-0373

The name and address of Pacific's registered agent are as follows:

Samuel Novell  
21250 Webster Street, Rm. 735A  
Oakland, CA 94612

9. Defendant GTEC is an incumbent local exchange carrier that provides service to customers in various exchanges located in portions of northern, central, and southern California. GTEC's address and telephone number are as follows:

GTE California Incorporated  
One GTE Place (RC3412)  
Thousand Oaks, CA 91362  
Tel: (805) 372-7631

The name and address of GTEC's registered agent are as follows:

CT Corporation System  
818 West Seventh Street  
Los Angeles, CA 90017

10. Joinder of the defendants herein is appropriate because OpTel's complaint as to each of them involves similar issues of fact and identical issues of law and policy.

## **V. FACTUAL ALLEGATIONS**

11. Each of the defendants provides local exchange service to residents of MDU complexes located within their respective service areas.

12. Among the MDU complexes to which Pacific provides such service are those listed in Exhibit A, hereto.<sup>1</sup> Sommerville and Conzelman are owners or co-owners with others of properties listed in Exhibit A, as indicated therein.

13. Pacific serves each of the MDU complexes listed in Exhibit A and a number of other MDU complexes through multiple points of demarcation, which are the points at which Pacific's network facilities terminate. Pacific's network facilities are cross-connected at the demarcation points to inter- and intra-building cable and other inside wiring, which complete communications paths to individual dwelling units within the MDU complexes.

14. Among the MDU complexes to which GTEC provides such service are those listed in Exhibit B.<sup>2</sup>

15. GTEC serves each of the MDU complexes listed in Exhibit B and a number of other MDU complexes through multiple points of demarcation, which are the points at which GTEC's network facilities terminate. GTEC's network facilities are cross-connected at the demarcation points to inter- and intra-building cable and other inside wiring, which complete communications paths to individual dwelling units within the MDU complexes.

16. TVMAX has entered into agreements with each of the owners of the properties listed in Exhibits A and B to furnish telecommunications and other services to residents of the properties, either directly or through its affiliate, OpTel. As an inducement to

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<sup>1</sup> Exhibit A is being submitted to the Commission with a request that it be placed under seal. However, Exhibit A is being served on Pacific Bell pursuant to a preexisting nondisclosure agreement.

<sup>2</sup> Exhibit B is being submitted to the Commission with a request that it be placed under seal. However, Exhibit B is being served on GTEC pursuant to a preexisting nondisclosure agreement.

the property owners to enter into such agreements, the agreements include provisions requiring TVMAX to operate and maintain all equipment, wiring, and facilities located on the property that are needed in order to allow such services to be so provided.

17. In order for OpTel or other competitive local carriers ("CLCs") to provide facilities-based services to end users in such MDU complexes, OpTel and other CLCs must have the ability to establish cross-connections to the specific inside wiring that connects to the premises of all end users who may elect to take service from OpTel or other CLCs.

18. OpTel cannot efficiently and economically provide its services to end users in the MDU complexes listed in Exhibits A and B, and certain other MDU properties, because there is no feasible way for it to extend its facilities to the multiple points of demarcation to which the inside wiring at such complexes now terminates. Although it would be possible for OpTel to install its own cabling to each of the points of demarcation, doing so typically would require it to traverse mature landscaping, patio areas, swimming pools, parking lots, or other structures and improvements on the properties at considerable cost to OpTel and with substantial disruption to residents' on-going use of the properties. Moreover, other CLCs desiring to offer their services at the MDU complexes may be required to undertake the very same activities. Such over-building in anticipation of serving some, all, or perhaps none of the residential populations at the MDU complexes is impracticable, cost-prohibitive, and generally is not acceptable to property owners.

19. In order for OpTel and other CLCs to be able to serve such properties, the defendants must reconfigure their existing multiple points of demarcation into single points of demarcation.

20. In furtherance of the purposes of the agreements between TVMAX and the MDU property owners, such agreements provide for the execution of letters of agency authorizing TVMAX, or its agents, to act on behalf of the property owners with respect to all matters concerning the provision of telecommunications services to such properties, specifically including the establishment of single points of demarcation.

21. Pursuant to such agreements and such authority, TVMAX submitted requests at various times to the defendants requesting that they consolidate their points of demarcation at each of the properties shown on Exhibits A and B to a single point.

22. In all cases, the reconfigurations requested by TVMAX have been technically feasible and TVMAX is informed and believes could have been completed easily within 90 days or less of TVMAX's requests. In addition, TVMAX has been and continues to be willing to advance the reasonable costs of the facilities or, if it would be more time- and cost-effective, to perform all or any part of the work itself.

23. GTEC's representatives have advised TVMAX that GTEC would comply with such requests, but GTEC has failed to do so on a reasonable and timely basis. Indeed, GTEC has not yet complied with any of such requests. TVMAX is informed and believes that GTEC will continue to fail to reasonably and timely comply with these requests and similar requests that TVMAX may submit in the future.

24. Pacific, on the other hand, has made varying representations to TVMAX relating to the establishment of single points of demarcation. OpTel raised this issue during its Fall 1997 local interconnection negotiations with Pacific, but, at that time, was advised by Pacific's representatives that Pacific had already established single demarcation points at MDU

complexes and that addressing wiring reconfigurations or, alternatively, access to subloop network elements would be unnecessary.

25. The following year, after TVMAX began establishing relationships with MDU property owners and, through that process, discovered that Pacific's earlier representations were incorrect (i.e., Pacific in fact was serving and continues to serve such properties using multiple points of demarcation), OpTel, on behalf of TVMAX and property owners, met again with Pacific to discuss the procedure for submission of requests and the costs and timeframes associated with reconfiguring Pacific's facilities. At that time, Pacific advised OpTel that it was under no obligation to honor OpTel's requests and would not do so.

26. OpTel and Pacific met a third time in December, 1998, following the issuance of Decision No. 98-12-023 in C.98-02-020, which ordered Pacific to reconfigure demarcation points at a number of MDU properties pursuant to requests made by CoxCom, Inc. At that time, Pacific advised OpTel that it was intending to seek rehearing of Decision No. 98-12-023. However, OpTel was led to believe that so long as OpTel or its affiliate was acting as the agent of the property owners in submitting its requests and that Pacific's establishment of new demarcation points would be subject to any changes in rules or other requirements established in response to Pacific's application for rehearing in C.98-02-020, Pacific would work with OpTel or its affiliate to perform such work on a timely, non-discriminatory basis following the filing of certain tariff changes required by Decision No. 98-12-023.

27. Subsequent to the December, 1998, meeting, Pacific filed changes to its tariff relating to the establishment of demarcation points. However, rather than merely complying with the Commission's order to remove certain provisions that the Commission found to be discriminatory, Pacific proposed to add new anti-competitive and discriminatory provisions

to the tariff, which prompted OpTel and other interested parties to file protests. Following the filing of these protests, Pacific has advised OpTel that it will not comply with any of complainants' requests for reconfiguration of demarcation points at MDU properties until its proposed tariff provisions are approved or unless ordered to do so by the Commission, which complainants are informed and believe would not occur on a timely basis absent the filing of this complaint and the accompanying motion for preliminary injunctive relief.

28. The defendants' respective failures to accommodate complainants' requests for reconfigurations of their demarcation points have effectively prevented TVMAX and OpTel from establishing service to numerous MDU properties, including each of the properties listed on Exhibits A and B. As a result, in some cases, TVMAX has been required to pay liquidated damages and, in other cases, is threatened with the expiration of its rights.

29. The defendants have caused and are continuing to cause irreparable harm to TVMAX's and OpTel's reputations and good will and are preventing OpTel from providing its services. Moreover, the defendants have placed and are continuing to place Sommerville, Conzelman, and other property owners at competitive disadvantage by depriving them of the ability to offer residents and potential residents of their properties true alternatives for facilities-based telecommunications services and related services from OpTel and other CLCs desiring to serve MDU properties. In addition, the defendants have harmed and continue to harm the residents of such properties by effectively denying them the ability to enjoy the advantages of competition in the provision of telecommunications services promised by the Telecommunications Act of 1996, state law, and Commission policy.

## **VI. BASES FOR RELIEF**

### **COUNT 1**

#### **Violations of Public Utilities Code § 453**

30. Complainants incorporate herein by reference the allegations contained in paragraphs 1 through 29, above.

31. Complainants are informed and believe, and on this basis allege, that each of the defendants has relocated and made other modifications to points of demarcation at MDU complexes pursuant to requests by property owners.

32. By Decision No. 98-12-023 in C.98-02-020, the Commission held that Pacific's changing demarcation points for some MDU property owners but not for others is unreasonably discriminatory, in violation of Public Utilities Code § 453.

33. The defendants' failures and refusals to establish single demarcation points pursuant to complainants' requests, as alleged herein, are and will be unreasonably discriminatory, in willful violation of Public Utilities Code § 453.

34. Complainants have no adequate remedy at law for the injuries now being caused and that in the future will be caused by defendants' violations of Public Utilities Code § 453.

### **COUNT 2**

#### **Violations of 1992 Settlement Agreement and Related Tariffs**

35. Complainants incorporate herein by reference the allegations contained in paragraphs 1 through 34, above.

36. Both defendants are signatory parties to the 1992 Settlement Agreement approved by the Commission in Decision No. 92-01-023, and the provisions of such settlement are now incorporated in the defendants' respective tariffs.

37. By Decision No. 98-12-023 in C.98-02-020, the Commission held that this 1992 Settlement Agreement requires utilities to effect changes to demarcation points on continuous properties if the property owners request such changes, so long as the property owners pay for the network cable and facilities required to effect the changes.

38. The properties for which complainants have requested changes to demarcation points are continuous properties, within the definition of the 1992 Settlement Agreement and the parallel provisions of defendants' tariffs.

39. The defendants' failures and refusals to establish single demarcation points pursuant to complainants' requests, as alleged herein, and their failures and refusals to establish changes to demarcation points that may be requested in the future, are or will be in willful violation of their obligations under the 1992 Settlement Agreement, Decision No. 92-01-023, and their tariffs.

40. Complainants have no adequate remedy at law for the injuries now being caused and that in the future will be caused by these violations.

### **COUNT 3**

#### **Violations of Public Utilities Code § 451**

41. Complainants incorporate herein by reference the allegations contained in paragraphs 1 through 40, above.

42. Public Utilities Code § 451 provides, in pertinent part:

"Every public utility shall furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

"All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

43. The defendants' failures and refusals to establish single demarcation points pursuant to complainants' requests, as alleged herein, and their failures and refusals to comply with similar requests in the future, are and will unreasonably and unjustifiably interfere with the ability of MDU property owners and residents to obtain access to competitive telecommunications services and violate state and federal policies favoring and promoting competition, all in willful violation of Public Utilities Code § 451.

44. Complainants have no adequate remedy at law for the injuries now being caused and that in the future will be caused by defendants' violations of Public Utilities Code § 451.

## **VII. SCOPING MEMO**

Complainants request that this complaint be designated an "Adjudicatory Proceeding." A hearing is not necessary as there are no disputed issues of material fact.

No public witness hearings are necessary. The specific issues that need to be addressed by the proceeding are: (1) whether the defendants' failures and refusals to modify demarcation points at MDU complexes pursuant to complainants' requests violate Public Utilities Code § 451, Public Utilities Code § 453, the 1992 Settlement Agreement, Decision No. 92-01-023, or their tariffs; and, (2) whether the Commission should order interim injunctive relief,

pursuant to a concurrently-filed motion by OpTel, pending completion of this proceeding, as well as permanent injunctive relief and reparations.

**Proposed Schedule**

Prehearing Conference: May 17, 1999

Consideration of Motion for Interim Injunctive Relief: May 17, 1999

Issuance of Decision on Motion for Interim Injunctive Relief: May 31, 1999

Filing of Motion for Summary Judgment: June 30, 1999

Submission: July 9, 1999

Administrative Law Judge decision: No later than 90 days after submission.

**VIII. PRAYER FOR RELIEF**

**WHEREFORE**, Complainants pray for relief as follows:

1. For an order that Pacific or GTEC, as applicable, change the demarcation points of continuous MDU properties, as requested by complainants, specifically including (without limitation) the properties owned by Sommerville and Conzelman and managed by SMC, within 90 days of receipt of the complainants' requests therefor.
2. For an order requiring that Pacific or GTEC, as applicable, pay reparations to TVMAX for the defendants' respective failures to timely complete the demarcation point changes for the properties listed in Exhibits A and B, in the form of refunds of, or credits against, any charges for completing such changes in amounts equal to the full amounts of such charges.
3. For an order requiring that Pacific or GTEC, as applicable, pay a penalty to TVMAX in the amount of \$1000 per day, per property, for each day beyond such 90 day period

that any such request for a demarcation change remains unmet, except to the extent any such delay is due to forces beyond Pacific's or GTEC's reasonable control.

4. For such other and further relief as the Commission may deem just and proper.

Respectfully submitted this 29th day of April, 1999 at San Francisco, California.

GOODIN, MACBRIDE, SQUERI,  
RITCHIE & DAY, LLP

By: 

John L. Clark

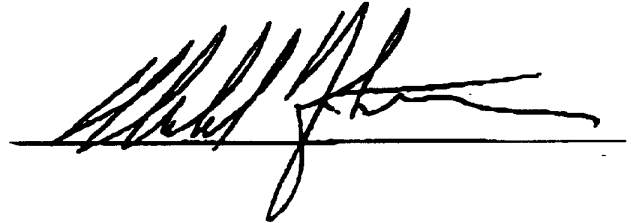
Attorneys for Complainants

### VERIFICATION

I, Michael Katzenstein, am an officer of OpTel (California) Telecom, Inc., one of the complainants herein, and am authorized to execute this verification on its behalf. The statements in the foregoing complaint are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed by me on the date shown below at Phoenix, Arizona.

Dated: April 28, 1999

A handwritten signature in black ink, appearing to read "Michael Katzenstein", is written over a horizontal line.

**EXHIBIT A**

**(SUBMITTED UNDER SEAL)**

**EXHIBIT B**

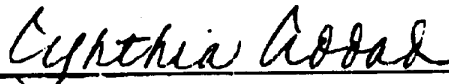
**(SUBMITTED UNDER SEAL)**

**CERTIFICATE OF SERVICE**

I, Cynthia Addad, certify that I have on this 29th day of April, 1999, caused a copy of the foregoing **COMPLAINT** to be served on the persons shown on the attached list by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of April, 1999 at San Francisco, California.

  
\_\_\_\_\_  
Cynthia Addad

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